



Commonwealth of Massachusetts State Ethics Commission

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SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 410

IN THE MATTER OF TILCON MASSACHUSETTS, INC.

DISPOSITION AGREEMENT

This Disposition Agreement ("Agreement") is entered into between the State Ethics Commission ("Commission") and the Tilcon Massachusetts, Inc. ("Tilcon") pursuant to §5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On September 20, 1989, the Commission initiated, pursuant to G.L. c. 268B, §4(a), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by Tilcon. The Commission has concluded its inquiry and, on April 18, 1990, found reasonable cause to believe that Tilcon violated G.L. c. 268A, §3(a).

The Commission and Tilcon now agree to the following findings of fact and conclusions of law:

1. Tilcon is a corporation doing business in Massachusetts as a paving materials manufacturer and paving contractor. During the time here relevant, a substantial portion of Tilcon's business consisted of municipal paving contracts. Tilcon's contract with the Town of Pembroke was one of at least twenty contracts Tilcon had with Massachusetts municipalities in 1987. The balance of Tilcon's business was commercial, with virtually no individual residential jobs such as driveways. On the rare occasions when Tilcon paved residential driveways, such paving was usually done for private customers with whom Tilcon had an ongoing business relationship or a prior long-standing business relationship.

2. In the Town of Pembroke, the town paving contract^{1/} is put out to bid and awarded annually by the Town Highway Surveyor. At all times here relevant, the Pembroke Highway Surveyor was Arthur Hermenau ("Hermenau"). As Pembroke Highway Surveyor, Hermenau was a municipal employee as defined in G.L. c. 268A, §1(g).

3. As Highway Surveyor, Hermenau was responsible for the maintenance and reconstruction of the town roads in Pembroke and for the operation of the Pembroke Highway Department. As Highway Surveyor, Hermenau was responsible for overseeing the bidding and award process by which the town paving contract was awarded annually. Hermenau annually advertised the availability of the contract in area newspapers and sent out by mail invitations to bid to several area paving contractors, including Tilcon. When bids were received, Hermenau held a public bid opening and awarded the contracts.^{2/} After the town paving contract was awarded, Hermenau was responsible as Highway Surveyor for determining town paving needs covered by the contract (i.e., for ordering paving and/or paving materials pursuant to the contract) and for overseeing the contractor's performance of its obligations under the contract.

4. In 1986, in bidding for the Pembroke paving contract for the period of September 1, 1986 through August 31, 1987, Tilcon submitted the low bid of \$27.14 per ton for Class I Bituminous Concrete in place and was awarded by Hermenau that portion of the town paving contract. Hermenau awarded the remainder of the contract to another vendor which had submitted the low bids on the other two portions of the contract. In 1987, in bidding for the Pembroke paving contract for the period of September 1, 1987 through August 31, 1988, Tilcon submitted the lowest bid on two out of three of the contract categories and tied for lowest bid on the third.^{3/} Hermenau awarded and split the third portion between Tilcon and the other low bidding vendor. In 1988, in bidding for the Pembroke paving contract for the period of September 1, 1988 through August 31, 1989, Tilcon submitted the lowest bid on one portion of the contract and tied with another vendor for the lowest bid on the other two contract categories. Hermenau awarded the

contract for the first category to Tilcon and split the contract award for the other two categories between Tilcon and the other low bidder.

5. In 1987, Hermenau owned a house in Pembroke with an unpaved driveway. As of July 1987, Hermenau had personally graded and prepared the driveway for paving and was anxious to have the paving done prior to the onset of winter. In July 1987, Hermenau approached John D'Allesandro ("D'Allesandro"), an employee of Tilcon with whom he had had dealings as Highway Surveyor in connection with Tilcon's work for the town, and asked him if Tilcon could pave his driveway. Hermenau informed D'Allesandro of the general dimensions of the driveway and told him that he wanted the work done before winter. D'Allesandro then went to Hermenau's property, viewed the site and agreed to do the work. According to Tilcon, D'Allesandro agreed to do the work only after speaking to and receiving authorization from Tilcon Vice-President and Brockton Branch Manager Joseph P. McMenimen ("McMenimen"). Before authorizing the work, McMenimen asked D'Allesandro if Hermenau agreed to pay for the work and D'Allesandro responded that Hermenau had agreed to pay for the work, according to Tilcon. Hermenau and D'Allesandro did not discuss what Hermenau would be charged by Tilcon for paving his driveway. Hermenau did not ask D'Allesandro for or receive in advance of the work an oral or written estimate of the price Tilcon would charge for paving the driveway.^{4/}

6. According to Hermenau, he sought to have Tilcon pave his driveway because he wanted his driveway done with a paving machine and roller, he wanted the job done before winter and because he was familiar with Tilcon as the town contractor and he had been satisfied with Tilcon's work for the town. At the time in question, the reputable smaller paving companies in the Pembroke area that did residential driveway paving did not possess paving machines and spread materials by hand and, further, were booked up to a year in advance with other projects and would not have been able to pave Hermenau's driveway prior to winter.

7. In July 1987, Tilcon placed 80.21 tons of Class I Bituminous Concrete on Hermenau's driveway as a base or "binder" course. The July 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and two laborers. In November 1987, Tilcon finished paving Hermenau's driveway by installing a second layer of 55.18 tons of Class I Bituminous Concrete. The November 1987 work required the use of a Tilcon paving machine and a roller and a Tilcon crew consisting of a foreman, a paver operator, a roller operator, two asphalt rakers and three laborers. Tilcon's use of a paving machine to install Hermenau's driveway resulted in a smoother, more aesthetically attractive and durable driveway than would have been possible by means of handraking and a roller alone, which would have been the method employed by a smaller local residential paving contractor.

8. In August 1987, Tilcon submitted a lump sum invoice to Hermenau and Hermenau paid Tilcon \$2,265.53 for Tilcon's July 1987 paving work on his driveway.^{5/} In November 1987, Tilcon charged Hermenau and Hermenau paid \$1,510.03 for the paving work completing his driveway. Tilcon's November 1987 bill recited that it was for "Class I Bit. Concrete in place as directed, 55.18 tons at \$27.09 a ton," and contained an "asphalt adjustment" charge of \$15.20.^{6/}

9. In both August and November 1987, Tilcon charged Hermenau and Hermenau paid the same rate as Tilcon then charged the Town of Pembroke for paving under the town paving contract that Hermenau awarded to Tilcon ("the town rate"). During the period here relevant, Hermenau was the only Pembroke homeowner whose driveway was paved by Tilcon as an independent project and the only private customer in Pembroke charged the town rate by Tilcon for paving work. Tilcon agreed to pave Hermenau's driveway and charged Hermenau the Pembroke town rate^{7/} because Hermenau was the Pembroke Highway Surveyor and also, according to Tilcon, in part because the company made a profit on the work.^{8/}

10. The rate for paving charged by Tilcon under the Town of Pembroke paving contract ("the town rate") was in part determined by the total quantity of paving purchased by the town, i.e., the town paid less per ton for paving than it would have paid had it contracted with Tilcon for significantly less paving. In charging Hermenau the town rate for the paving of his driveway, Tilcon conferred upon Hermenau the benefit of the reduced per ton cost charged to the town based upon the relatively large quantity of paving the town purchased from Tilcon.^{9/} In addition to and apart from the benefit represented by being charged the town rate, Hermenau's access to Tilcon's paving services was itself a benefit to Hermenau. Not only was Tilcon able to work before winter as Hermenau wanted, at a time when other contractors were not available, but Tilcon was able to do the work at a higher standard of quality than a small local driveway contractor would have been able to achieve.

11. Section 3(a) of G.L. c. 268A prohibits anyone from giving a municipal employee anything of substantial value for or because of any official acts performed or to be performed by the municipal official.

12. By agreeing to provide Hermenau with residential paving services that it did not normally perform, by performing those paving services for Hermenau, and by charging for those services at the town rate, all while Tilcon was a bidder on the town paving contract and a town vendor subject to Hermenau's official authority as Highway Surveyor to award the town paving contract and to oversee its performance, Tilcon provided Hermenau with benefits which were of substantial value^{10/} for or because of acts within Hermenau's official responsibility performed or to be performed by Hermenau as Highway Surveyor. In doing so, Tilcon violated G.L. c. 268A, §3(a).

13. The Commission is aware of no evidence that Tilcon's employees knew at the time they paved Hermenau's driveway that their actions violated G.L. c. 268A, §3.^{11/} The Commission is also aware of no evidence that Tilcon sought from Hermenau as Highway Surveyor any specific official action concerning any matter which would affect Tilcon in return for its provision to him of the above-described benefits.^{12/} However, even if the provision of the benefits was only intended to create official goodwill, it was still impermissible.^{13/}

In view of the foregoing violations of G.L. c. 268A, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Tilcon:

(1) that Tilcon pay to the Commission the sum of one thousand dollars (\$1,000.00) as a civil penalty for the violations of G.L. c. 268A, §3(a)^{14/}; and

(2) that Tilcon waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

Date: April 21, 1994

^{1/} The town paving contract covers Pembroke's paving needs for the twelve month period, September 1st through August 31st. During the time here relevant, the contract had three components, each of which could be separately awarded to a different vendor with the lowest bid as to that component or divided between vendors with tying bids as to a component: (1) 6000 tons of class I Bituminous Concrete in place; (2) 1500 tons of Bituminous Concrete Type I; and (3) 1500 tons of Asphalt Stockpile Mix to be picked up at the vendor's plant.

^{2/} Hermenau's primary criterion for awarding the contract was the price bid, i.e., the contract was generally awarded to the lowest bidder. When the prices bid were close, however, Hermenau had discretion to consider other factors in awarding the bid, such as the distance from the town of the bidders' manufacturing plants, the reputation of the bidders and his own knowledge of any prior problems with the bidders. During the time here relevant, except for a single instance not here material, the contract was always awarded to the low bidder or split between bidders who had submitted the same low bid.

^{3/} Tilcon bid a price of \$27.09 per ton for Class I Bituminous Concrete in place.

^{4/} The price charged Hermenau by Tilcon for its work in paving the driveway was determined by McMenimen. The agreement pursuant to which Tilcon paved Mr. Hermenau's driveway was oral and was not reduced to writing.

^{5/} Tilcon's records show that this invoice was for 80.21 tons of binder, tax included.

^{6/} Hermenau was not charged and did not pay any tax when he paid Tilcon for the November 1987 work.

^{7/} The Commission is aware of no evidence that Tilcon and Hermenau actually negotiated the application of the town rate to Tilcon's charges for paving Hermenau's driveway. After the July 1987 paving work was completed, Tilcon unilaterally decided to charge Hermenau the town rate for the paving of his driveway in part because, according to Tilcon, the company believed that it was a fair way to price the work on the driveway (which was similar to a small street).

^{8/} The Commission is aware of no evidence that Tilcon provided these benefits to Hermenau in return for his being influenced in his performance of any specific official act as Highway Surveyor or any particular act within his official responsibility as Highway Surveyor.

^{9/} Hermenau would have paid approximately \$500 more than he was charged by Tilcon for the paving of his driveway if he had dealt with a private contractor at the then customary market rate.

^{10/} Anything which has a value of \$50 or more is of substantial value for the purposes of the conflict of interest law. See *Commonwealth v.*

Famigletti, 4 Mass. App. 584 (1976).

^{11/} Ignorance of the law is no defense to a violation of the conflict of interest law. *In re Doyle*, 1980 SEC 11, 13; see also *Scola v. Scola*, 318 Mass. 1, 7, (1945).

^{12/} The Commission is further aware of no evidence that Tilcon's above-described private dealings with Hermenau had any effect on Tilcon's performance of its paving contract with the Town of Pembroke.

^{13/} As the Commission made clear in its decision *In re Michael*, 1981 Ethics Commission 59, 68, and in *Advisory No. 8*, §3 of G.L. c. 268A is violated even where there is no evidence of an understanding that the gratuity is being given in exchange for a specific act performed or to be performed. Indeed, any such *quid pro quo* understanding would raise G.L. c. 268A, §2 issues. Section 2 is not applicable in this case, however, as there was no such *quid pro quo* between Tilcon and Hermenau.

^{14/} While the Commission is empowered to impose fines of up to \$2,000 for each violation of G.L. c. 268A, §3, the Commission has determined that it is in the public interest to resolve this matter with a \$1,000 fine because the prohibited conduct in this case was apparently a single incident and not part of a pattern or practice of misconduct and involved a relatively small amount of value given and received.